UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

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IN THE MATTER OF:	Case No.: 22-CA-29242
CENTURY BUFFET AND RESTAURANT,	
Respondent,	
And	-1
318 RESTAURANT WORKER'S UNION,	
Charging Party.	
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RESPONDENT'S MOTION TO REOPEN RECORD

The Respondent respectfully requests the National Labor Relations Board (the "Board") to reopen the record to receive additional evidence on the grounds that Respondent seeks to adduce evidence that is new, could not have been introduced at hearing, is material and highly probative evidence that seriously impairs the credibility of a key witness, and would require a different result if addressed and credited, and on the basis of the following:

Background

- 1. A hearing on the alleged unfair labor practice in the above-captioned matter was held before Administrative Law Judge ("ALJ") Steven Davis on August 3 and 4, November 18 and December 9, 2010.
- 2. The ALJ closed the record on December 9, 2010. Hearing Transcript ("Tr.") page 478 lines 5-8.

3. On May 2, 2011, the ALJ filed its Decision and transferred this matter to and continued before the Board.

Respondent's Motion To Reopen Record To Receive Additional Evidence

- 4. The Board Rules and Regulations ("Board Rules") allow a party to a proceeding before the Board to "move for reconsideration, rehearing, or reopening of the record after the board decision or order." Section 102.48(d). The same section of the Board Rules provides that "[a] motion to reopen the record shall state briefly the additional evidence to be adduced, why it was not presented previously, and that, if addressed and credited, it would require a different result."
- 5. The Board has generally granted motions to reopen where new evidence surfaces after the hearing that significantly affects the credibility assessment of witnesses. *See* Sunshine Piping, Inc. v. United Assoc. of Journeymen & Apprentices, 351 N.L.R.B. 1371, 1409 (N.L.R.B. 2007) (case reopened because new evidence suggests that respondent knowingly altered its records in anticipation of litigation and in response to charges filed under the National Labor Relations Act); Anderson v. VA, 2010 MSPB LEXIS 5007 (M.S.P.B. Aug. 25, 2010) (appellant's motion to reopen and supplement the record granted because new evidence surfaces that called into question the credibility assessment of a witness.)
- 6. Here, Respondent is moving to adduce: 1) Certificate of Incorporation for 88

 Auto Security & Sound Inc. ("88 Auto"), which shows Ji Xian Liang ("Jessica") as the designated agent of the corporation and the person who initially filed the Certificate of Incorporation. Certificate of Incorporation annexed hereto as **Exhibit A**; 2) 88 Auto's Certificate of Change, which shows that Jessica has been the President of the corporation.

Certificate of Change annexed hereto as **Exhibit B**; 3) Jessica's W-2 forms from 2007 to 2009, which shows that, in addition to working at Respondent restaurant, Jessica was employed by Baby Budda NYC Inc. and New Baby Budda Inc. during the same period. W-2 forms annexed hereto as **Exhibit C**; 4) document showing that Jessica received New York State unemployment benefits during 2009 despite being a business owner. Unemployment insurance record annexed hereto as **Exhibit D**; and 5) a handwritten document by the Union representative Tony Tsai ("Tony"), in which Tony requested that employees work less hours. Document annexed hereto as **Exhibit E**.

- 7. All of the evidence herein sought adduced are new evidence that only came to light after the close of the hearing.
 - 8. The ALJ closed the record on December 9, 2010. Tr. 478 L 5-8.
- 9. On or about December 9, 2010, Respondent received, among others, Jessica's tax returns and W-2 forms for the years 2007 to 2009, along with documents indicating her New York State Unemployment Insurance benefit payments.
- 10. On May 4, 2011, Respondent received corporate documents of 88 Auto from the New York Department of State.
- 11. In or about May, 2011, Respondent discovered a document in Union representative Tony's handwriting that was written during a meeting June 2009, in which Tony requested that employees work less hours.
- 12. On June 20, 2011, Respondent received, among others, Jessica's 2006 tax return and 88 Auto's 2009 tax return.
- 13. On July 15, 2011, Respondent received, among others, 88 Auto's 2007 and 2008 tax returns, and Jessica's 2008 W-2 forms.

- 14. Jessica's tax documents were provided to the Respondents pursuant to an Order dated October 27, 2010 of the Honorable Michael A. Shipp of the United States District Court, District of New Jersey. Order of Judge Ship attached hereto as **Exhibit F**. Even though the Judge ordered the production of tax documents in October of 2010, the employees purposely delayed the production thereof until July of 2011.
- 15. Like the evidence sought adduced in <u>Sunshine Piping</u>, <u>Inc.</u>, these evidence here seriously impairs the credibility of a key witness. 351 N.L.R.B. at 1409. As evidence already in the record shows, Jessica, in her testimony in the federal action, denied knowledge that her husband operated a business. GC10 P205 L13 to P206 L20. Jessica even denied outright that her husband owned an auto shop. GC10 P209 L11 to L21.
- 16. The Department of State records, specifically 88 Auto's Certificate of Incorporation and Certificate of Change, which came to light only after the close of the hearing, directly contradicts Jessica's testimony cited above. Contrary to her sworn statements, Jessica was in fact the President of 88 Auto and was the person who incorporated the entity on November 30, 2007. See Exhibit A and B.
- 17. The newly discovered corporate records of 88 Auto unambiguously prove that Jessica knowingly gave false testimony on the record and to the Court. Such bold-faced lies on its own should be sufficient to justify the Board reopening the record. Such perjurious conduct as demonstrated by evidence here would require a different result in Jessica's credibility assessment, as it completely destroys Jessica's credibility as a key witness for the Charging Party.

- 18. Jessica's W-2 forms during the relevant period also raise serious doubts on the credibility of her testimony. Jessica testified that she was employed by Respondent twelve to thirteen hours per day for six days a week. Tr. P224 L23-25; P225 L1-2. However, her newly discovered W-2 forms indicate that Jessica in fact held other jobs with significant income during that same time period. *See* Exhibit C. Her 2008 W-2 forms show that Jessica earned more than \$20,000 from her employment with the restaurants Baby Budda NYC Inc. and New Baby Budda Inc. during 2007. Id.
- 19. First, Jessica has failed to disclose her employement with these two restaurants during the hearings and other proceedings. Her failure to disclose her additional employments led the General Counsel to believe that she was not employed after leaving Respondent restaurant. Tr. P474 L18-20.
- 20. Second, and most significantly, if Jessica indeed worked twelve to thirteen hours a day for six days a week at the Respondent restaurant as she had testified, she could not possibly have had the time to also work for Baby Budda Inc. and New Baby Budda Inc. and earn \$20,000 during the same period. Therefore, the W-2 forms create significant inconsistencies in Jessica's testimony and seriously undermines ALJ's credibility assessment of her. This evidence is newly discovered and is a critical piece of the puzzle, without which the Board's credibility assessment regarding Jessica's testimony would be incomplete. As such, the Board should reopen the record to allow the addition of this evidence.
- 21. The New York State Department of Labor document, which was discovered after the close of the record, shows that Jessica had applied for and received unemployment insurance benefits during 2009. See Exhibit D. As 88 Auto's corporate

documents show, Jessica was the owner and president of the business during the same time period. **Id**. As the owner of a small business, Jessica is not entitled to receive unemployment insurance benefits under New York Law. Therefore, this evidence further undermines Jessica's credibility, as it proves that she lied about her involvement with 88 Auto not only in her sworn testimony before the Court, but also in her application for state unemployment benefits. As such, the Board should allow the evidence to be adduced in order to properly make its requisite credibility assessment of Jessica.

- 22. The document bearing Tony's handwriting should be adduced because it corroborates the testimony of Ko Fung "Peter" Yeung ("Peter"), and directly contradicts the ALJ's finding on the same point. Peter testified that the decision to change employee's hours was prompted upon request by Tony during a meeting in June of 2009. Tr. P340. However, the ALJ, in its May 2, 2011 decision, found that "it is very doubtful that Tony would ask that the employees work fewer hours, thereby making less money." ALJ Decision P20 L50-51.
- 23. The document annexed as Exhibit E, if addressed and credited, requires an entirely difference result than that of the ALJ's finding. The handwritten document herein sought adduced actually corroborates Peter's testimony that Tony did in fact request the change in employee work hours. The document is written in Tony's handwriting and shows the hours the Union was requesting on behalf of the employees.

 See Exhibit E. The document is clear on its face that Tony requested the worker's hours be change to about 8 hours per day, from 11 AM to 8:30 PM, with 1 ½ hours of break time in between. Id. As such, the document corroborates Peter's testimony and shows that the ALJ's finding was not based on evidence but purely upon personal conjecture

and speculation. Had this evidence been before the ALJ, the ALJ surely could not have

found it "very doubtful that Tony would ask that the employees work fewer hours, ...".

ALJ Decision P20 L50-51. Accordingly, the Board should allow this evidence to be

adduced because it requires a different result if addressed and credited.

Given that the evidence sough to be adduced are new, could not have been 24.

introduced at hearing, are material and highly probative as to the credibility of key

witnesses, and would require a different result, Respondent respectfully requests that the

Board enter an Order to reopen the record to receive additional evidence.

WHEREFORE, Respondent respectfully requests that the Board grant Respondent's

motion and enter an Order to reopen the record to receive additional evidence attached

hereto.

Dated: September 23, 2011

New York, New York

Respectfully submitted,

Law Office of Benjamin B. Xue, P.C.

Counsel for the Respondent

/s/ Benjamin B. Xue

Benjamin B. Xue

401 Broadway, Suite 1009

New York, NY 10013

(212) 219-2275

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STATE OF NEW YORK

DEPARTMENT OF STATE

I hereby certify that the annexed copy has been compared with the original document in the custody of the Secretary of State and that the same is a true copy of said original.



WITNESS my hand and official seal of the Department of State, at the City of Albany, on May 4, 2011.

(vat also

Daniel E. Shapiro First Deputy Secretary of State

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New York State
Department of State
Division of Corporations, State Records
and Uniform Commercial Code
Albany, NY 12231

(This form must be printed or typed in black ink)
CERTIFICATE OF INCORPORATION

	(Insert corporate name)
	Under Section 402 of the Business Corporation Law
FIRST:	The name of the corporation is: 88 Auto Security & Sound Inc
corporation to engage	ID: This corporation is formed to engage in any lawful act or activity for which on may be organized under the Business Corporation Law, provided that it is not forme in any act or activity requiring the consent or approval of any state official, department ency or other body.
THIRD:	The county within this state, in which the office of the corporation is to be located is iGueens
	H: The total number of shares which the corporation shall have authority to issument of the par value of each share or a statement that the shares are without par value. No Par Value
FIFTH: against the of any pro-	The secretary of state is designated as agent of the corporation upon whom process corporation may be served. The address to which the Secretary of State shall mail a coppers accepted on behalf of the corporation is:
	Li Xian Jiang 100-32 Metropolitan Ave Forest Hills, NJ 11375
SIXTH: process ag	(optional) The name and street address in this state of the registered agent upon whon ainst the corporation may be served is:
,	

DOS-1239 (01/00)

SEVENTH: (optional—if this provision is used, a specific date must be stated which is not before, nor more than 90 days after the date of filing) The date corporate existence shall begin, if other than the date of filing, is:

X. Wich harry

(Signature)

Li Xian Jiang

(Type or print name)

100 - 32 Metropolitan Ave

(Address)

Forest Hill, NY 11375

(City, State, Zip code)

This form may not contain any attachments or riders except an original receipt evidencing reservation of name.

FILED MASS

CERTIFICATE OF INCORPORATION

OF

88 Auto security & Sound Inc

Under Section 402 of the Business Corporation Law

Filed by:

(Name)

100-32 Metropolitan A

(Mailing address)
Forest Hill, NY 11375

(City, State and Zip code)

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STATE OF NEW YORK DEPARTMENT OF STATE

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STATE OF NEW YORK

DEPARTMENT OF STATE

I hereby certify that the annexed copy has been compared with the original document in the custody of the Secretary of State and that the same is a true copy of said original.



WITNESS my hand and official seal of the Department of State, at the City of Albany, on May 4, 2011.

Daniel E. Shapiro

First Deputy Secretary of State

New York State
Department of State
Division of Corporation, State Records
And Uniform Commercial Code
One Commerce Plaza, 99 Washington Avenue
Albany, NY 12231
www.dos.state.nyc.us

CERTIFICATE OF CHANGE OF

88 AUTO SECURITY & SOUND INC

Under Section 805-A of the Business Corporation Law

FIRST: The name of the corporation is

88 AUTO SECURITY & SOUND INC

SECOND: The certificate of incorporation was filed with the Department of State on 11/30/2007

THIRD: The change(s) effected hereby are:

- The county location, within this state, in which the office of the corporation is located, is change to: Nassau
- The address to which the Secretary of State shall forward copies of process accepted on behalf of the corporation in changed to read in its entirety as follows Zhao Nuan Wang
 33 S Franklin St. S Hempstead, NY 11550-4925
- * The corporation hereby:

* Des	signates
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* Cha	anges the address of its registered agent to:

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* Revokes the authority of its registered agent.

FOURTH: The change was authorized by the board of directors.

Lizean/sour

Li Xian Jiang (President)

Name and Title of Signer

CERTIFICATE OF CHANGE OF

88 AUTO SECURITY & SOUND INC

Under Section 805-A of the Business Corporation Law

STATE OF NEW YORK DEPARTMENT OF STATE

File's Name

Myron Yang Accounting

Address

136-15 37 Ave. #2A

Flushing, NY 11354

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NEW YORK STATE DEPARTMENT OF LABOR PAYMENT UNIT, BUILDING 12 1099-G PO BOX 621 ALBANY, NY 12201-0621

Do You Qualify For An Earned Income Credit?

You may be entitled to a Federal tax credit. The amount of the credit is based on your earned income such as wages and self-employment. This credit may be allowed even if you do not owe any Federal income tax. However, you must file a Federal income tax return to obtain the credit. See the instructions on your Federal income tax forms to determine if the amount of your income allows you to claim this credit.

L JIANG 148-01 61 RD FLUSHING

NY 11367

Important Information About Form 1099-G

New York State is required to report the unemployment compensation payments of \$10 or more, that you received last year, to the Internal Revenue Service, and to furnish you with Form 1099-G by January 31 of this year. Unemployment compensation includes:

- Unemployment Insurance payments
- Extended Benefits and Federal Supplemental Compensation payments
- TAA (Trade Adjustment Act) basic, retroactive, and additional training payments
- DUA (Disaster Unemployment Assistance) payments.

Please keep Form 1099-G for your records. You will need this information to complete your Federal, State and Local Income tax returns. If you did not receive any unemployment compensation this year, but repaid an overpayment, this form is being sent in case it will be of help to you.

Note: Unless you have voluntarily authorized Federal or State withholding, Federal, State and Local income taxes are not withheld on unemployment compensation. If you expect to receive these benefits in the future, you can ask the payer to withhold Federal and State income tax from each payment. Or, you can make estimated tax payments during the year. For more information regarding how to make estimated tax payments, see instructions on the appropriate tax return, or, contact the Internal Revenue Service or the NYS Department of Taxation and Finance.

BOX 1 Shows the total unemployment compensation paid to you this year. For tax year 2009, combine the box 1 amounts from all Forms 1099-G, and report the amount in excess of \$2,400 as income on the unemployment compensation line on your return. If this 1099-G is for a year other than

2009, see the instructions on the appropriate tax return, or contact the internal Revenus Servics, the NYS Department of Taxation and Finance or your local taxing authority to determine the amount of taxable unemployment insurance.

Box 2 Shows adjustments credited to you this year. Adjustments include money we received including cash (money orders and personal checks) In repayment of an overpayment. Current unemployment compensation, used to repay (offset) existing overpayments, is not included in this amount. Adjustment information may be helpful to you in filing your return.

BOX 4 Shows total Federal income tax withheld from unemployment compensation paid to you this year. (If you voluntarily authorized withholding, tax has been withheld at a 10% rate.) Include tax withheld, if any, on your income tax return.

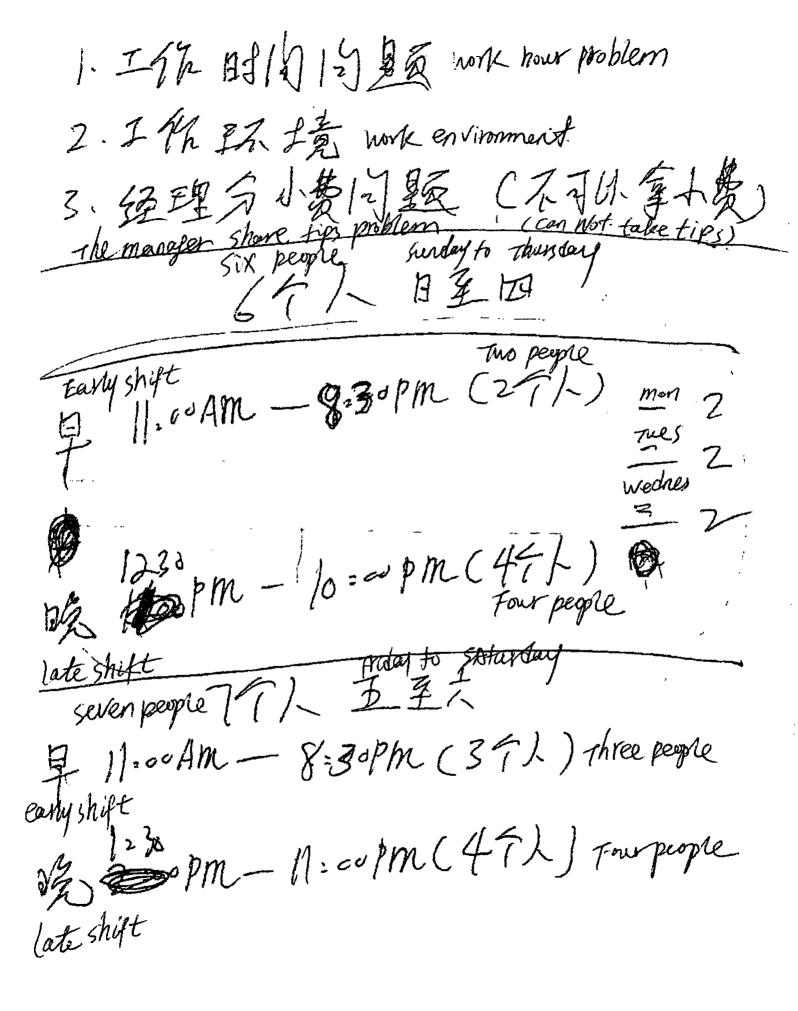
BOX 5 Shows Alternative Trade Adjustment Assistance (ATAA) payments you received. This amount is not included in Box 1 amounts.

BOX 10a Shows the payer's state.

BOX 10b Shows the payer's Federal Identification Number.

BOX 11 Shows total State income tax withheld from unemployment compensation paid to you this year. (If you voluntarily authorized withhelding, tax has been withheld at a 2.5% rate.) Include tax withheld, if any, on your income tax return.

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AFFIRMATION OF TRANSLATION

I, Thomas H.C. Kung, an attorney duly admitted to practice law in the State of New York, affirms, under the penalty of perjury, that I am fluent in English and in Mandarin-Chinese, and I have faithfully translated Exhibit A of the Respondent's Brief in Support of Its Exceptions to ALJ's Decision, from Mandarin-Chinese to English.

Thomas H.C. Kung